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'An Unqualified Human Good': E.P. Thompson and the Rule of Law

DANIEL H. COLE*

The late E.P. Thompson described himself as 'a historian in the Marxist tradition'. But when he embraced the Rule of Law (in Whigs and Hunters), many of his colleagues on the left ostracized him as an apostate. This essay argues that Thompson's critics have largely misunderstood what he meant by the Rule of Law. His was a minimal and historical conception, which merely sought to distinguish states whose rulers had unfettered discretion from states whose rulers were constrained by legal rules, whatever their source and contents. Also, in contrast to other radical theorists, Thompson recognized that law would be a necessary institution in any complex society, no matter what its economic basis, to mediate social relations. The essay concludes with some thoughts about the relevancy of Thompson's conception of the Rule of Law for ongoing efforts to revitalize a more 'radical liberalism'.

INTRODUCTION

When Edward Palmer (E.P.) Thompson died in 1993 at the age of 69, he was hailed as the greatest historian in the English-speaking world.¹ While other historians focused on the dominant figures and major events of history, Thompson wrote of the ordinary men and women who both made and

1 See B.D. Palmer, 'Homage to Edward Thompson, Part I' (1993) 32 *Labour/Le Travail* 11, at 14. Thompson was also the world's most often cited twentieth-century historian, and among the 250 most frequently cited authors of all time. E. Hobsbawm, 'E.P. Thompson' (1994) 58 *Radical History Rev.* 157, at 157.

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suffered through the epochal upheavals of the Industrial Revolution.² In dignifying them with respect and sympathy, Thompson displayed an uncommon understanding of the human condition.

Thompson also displayed a great appreciation for law as a social institution, especially for a (self-described) 'historian in the Marxist tradition'. He found 'the rhetoric of eighteenth-century England ... saturated with the notion of law':³

The law did not keep politely to a 'level' but was at *every* bloody level; it was imbricated within the mode of production and productive relations themselves (as property-rights, definitions of agrarian practice) and it was simultaneously present in the philosophy of Locke; it intruded brusquely within alien categories, reappearing bewigged and gowned in the guise of ideology; it danced a cotillion with religion, moralising over the theatre of Tyburn; it was an arm of politics and politics was one of its arms; it was an academic discipline, subjected to the rigour of its own autonomous logic; it contributed to the definition of the self-identity both of rulers and of ruled; above all, it afforded an arena for class struggle, within which alternative notions of law were fought out.⁴

Thompson's identification of law as the locus of political contention led his student and colleague, Peter Linebaugh, to write that Thompson's central message to his readers was 'Go to Law School'.⁵

This essay examines the function of law in Thompson's historical works in light of his conception of the Rule of Law, which he articulated as an inchoate afterthought in *Whigs and Hunters* (1975). I will argue that Thompson's reverence for the Rule of Law was in no way inconsistent with his derision of the unjust legal rules and procedures that curtailed the legal and constitutional rights of 'freeborn Englishmen' in the eighteenth century. I will review and respond to criticisms of his espousal of the Rule of Law. And I will suggest that Thompson's conception of the Rule of Law (although or, perhaps, because he left it incompletely theorized) points the way toward a possible reconciliation of liberal and radical approaches to law.

2 As Thompson famously expressed it in *The Making of the English Working Class*, his aim was 'to rescue the poor stockinger, the Luddite cropper, the "obsolete" hand-loom weaver, the "utopian" artisan, and even the deluded follower of Joanna Southcott, from the enormous condescension of posterity.' E.P. Thompson, *The Making of the English Working Class* (1963) 12.

3 E.P. Thompson, *Whigs and Hunters: The Origins of the Black Act* (1975) 263.

4 E.P. Thompson, *The Poverty of Theory* (1995 edn.) 130.

5 P. Linebaugh, 'From the Upper West Side to Wick Episcopi' (1993) 201 *New Left Rev.* 18, at 25.

THOMPSON ON UNJUST LEGAL RULES

E.P. Thompson was an unrelenting critic of unjust legal rules that served the interests of England's propertied classes and abrogated the pre-existing legal and constitutional rights of its nascent working classes in the first generations of the Industrial Revolution. Like Marx, Engels, and other socialist critics, he reviled the use of law as an instrument of class oppression. Indeed, the vast majority (though not all) of Thompson's references to specific laws and legal rules are highly critical⁶ – not what one would expect from a champion of the Rule of Law.

The law, which was only a peripheral topic in Thompson's 1963 masterpiece, *The Making of the Working Class*, played a central role in many of Thompson's later works, most notably in *Whigs and Hunters*. In that book, Thompson addressed how the law was corrupted to serve the interests of the propertied class against the historical rights of other free-born Englishmen. Thompson's subject in *Whigs and Hunters* was the infamous Black Act, enacted in May 1723, in which Parliament extended the death penalty to rebellious acts such as deer stealing, tree cutting, and burning by agrarian rebels, whose traditional legal rights to hunt and forage on common lands had been curtailed (often without compensation) by enclosure laws.⁷ The statute's title referred to the blackened faces the rebels wore in disguise.

Enclosure, which had been an ongoing process since the fifteenth century, converted common lands to private/individual ownership, and in doing so turned many users of the commons into trespassers. Economic historians typically cite the enclosure movement in England as a prime example of an institutional change that makes possible higher levels of economic growth and resource conservation because of the greater incentives to production and conservation provided by private (by which they mean individual) ownership of land.⁸ But their analyses typically neglect the *legal* effects of enclosure. When

6 See R. Fine, 'The Rule of Law and Muggleonian Marxism: The Perplexities of Edward Thompson' (1994) 21 *J of Law and Society* 193, at 208 ('in all its manifestations, Thompson's attitude to law was critical').

7 The Black Act is reprinted in Thompson, op. cit., n. 3, at appendix I, pp. 270–7. Thompson more clearly asserts in a later work, *Customs and Commons*, that hunters and foragers believed their historical uses, 'practised "time out of mind"', were in fact 'rights'. E.P. Thompson, *Customs in Common: Studies in Traditional Popular Culture* (1991) 151.

8 See, for example, J.M. Neeson, *Commoners: Common Right, Enclosure and Social Change in England, 1700–1820* (1993) at 7–9; R. Ellickson, 'Property in Land' (1993) 102 *Yale Law J.* 1315, at 1391–2; D.C. North and B.R. Weingast, 'Constitutions and Commitment: The Evolution of Institutions Governing Public Choice in Seventeenth-Century England' (1989) 49 *J. Economic History* 803, at 829. That the eighteenth-century enclosure movement in England enhanced economic efficiency has recently been challenged. See, for example, R. Allen, 'Agriculture during the industrial revolution' in *The Economic History of Britain Since 1700*, eds. R. Floud and D. McCloskey (1994) 96.

Parliament turned the commons into private, individually-owned property, it did not *create* property rights where none had existed before; rather, enclosure redistributed existing property rights. As Thompson explained:

What was often at issue was not property, supported by law, against no-property; it was alternative definitions of property-rights: for the landowner, enclosure; for the cottager, common rights; for the forest officialdom, 'preserved grounds' for the deer; for the foresters, the right to take turfs. For as long as it remained possible, the ruled – if they could find a purse and a lawyer – would actually fight for their rights by means of law; occasionally the copyholders, resting upon the precedents of sixteenth-century law, could actually win a case. When it ceased to be possible to continue the fight at law, men still felt a sense of legal wrong: the propertied had obtained their power by illegitimate means.⁹

The enclosure laws took away property rights – specifically, common-use rights – from those who traditionally had foraged and grazed their animals on the commons, and gave those rights to other, politically powerful individuals who already possessed a great deal of property. This is the story of the enclosure acts Thompson relates in *Whigs and Hunters*.

The law and lawyers were at the center of Thompson's story. Under the influence of liberal theorists, such as Adam Smith and John Locke, England's common law lawyers of the eighteenth century became 'converted to the notions of absolute property ownership' in preference to 'the messy complexities of coincident use-right'.¹⁰ The enclosure movement generally, and the Black Act in particular, reflected this conversion, and 'represented the culmination of a social and economic struggle through which a "customary" economy of forest-dwellers was destroyed and replaced by a market-oriented regime based on 'capitalist property rights'.¹¹ Those whose rights were extinguished received, at best, 'perfunctory compensation'.¹² For the most part, their rights were simply converted into crimes, some of which were punishable by death. When they protested against these usurpations, the dispossessed were not viewed as rights-holders defending their property but were branded as criminals interfering with the property of others. For Thompson, however, they were defenders of the traditional legal and constitutional rights of freeborn Englishmen against unjust expropriation without compensation.¹³ Thompson's argument, although highly critical of legal injustice, was, thus, decidedly legalistic.

9 Thompson, *op. cit.*, n. 3, at p. 261.

10 *id.*, p. 241.

11 B. Fine, *Democracy and the Rule of Law: Liberal ideas and Marxist critiques* (1984) 181.

12 Thompson, *op. cit.*, n. 3, at p. 241.

13 Thompson does not, however, romanticize the hunters: 'Because we can show that offenders were subject to economic and social oppression, and were defending certain rights, this does not make them instantly into good and worthy "social" criminals ... The Blacks were, one presumes, rough; and after the Black Act was passed they may have become rougher' *id.*, p. 193.

The Black Act was for Thompson 'a bad law, drawn by bad legislators, and enlarged by the interpretations of bad judges'.¹⁴ It was an instrument of class power pure and simple that could not be reconciled in any way with 'natural justice'.¹⁵ That did not lead Thompson to conclude, however, that all laws inevitably are instruments of injustice.

THOMPSON'S EPIPHANY: THE RULE OF LAW AS 'AN UNQUALIFIED HUMAN GOOD'

1. Thompson's defence of the Rule of Law

The first 258 pages of *Whigs and Hunters* could have led Thompson to a conventional Marxian conclusion that law is an instrument of brute force by which the ruling class consolidates and reinforces its hegemony. To the extent the hunters in Thompson's story thought themselves protected by the ancestral/mythical 'rights of freeborn Englishmen', they were deluded: the law branded them criminals and sentenced them to death for exercising their supposed 'rights'. Indeed, Thompson concludes that the Black Act constituted a form of state-sponsored 'Terror'.¹⁶ Thompson might have ended his book on that note, but did not.¹⁷ Instead, he added an afterword,¹⁸ a seemingly incongruous essay not about the legal and political conflicts over forest lands but about the implications of his study for the law and its analysis by historians. It is entitled, 'The Rule of Law', and its eleven pages comprise one of the greatest defences ever mounted of that concept (and one of the very few penned by a self-described Marxist).¹⁹

Having exposed the inequities of the Black Act and the enclosure movement, Thompson proceeds to caution his readers not to infer from his analysis that the Rule of Law is *only* a mask for the rule of a class. Law surely *is* an instrument of class power, but that is not all it is. In writing this, Thompson repudiates the typical 'Marxist-structural critique', according to which the law has no independent existence, but is wholly determined by social relations, which themselves are determined by the economic base of social relations.²⁰ Thompson denies this. To be sure, he writes, the law is ideological. In the eighteenth century the law became 'a superb instrument by which the ... rulers were able to impose new definitions of property to

14 *id.*, p. 267.

15 *id.*

16 *id.*, p. 258.

17 *id.*

18 Thompson's widow, Dorothy, has expressly referred to it as such. Letter from Dorothy Thompson, 26 June 1997, on file with the author.

19 Another is F. Neumann, *The Rule of Law* (1986).

20 See, for example, K. Marx, *Contribution to A Critique of Political Economy* (1970 edn.) 20–1.

their even greater advantage, as in the extinction by law of indefinite agrarian use-rights and in the furtherance of enclosure'.²¹ But, Thompson insists, the law is not *just* ideology; it has (and must have) its 'own logic, rules and procedures':

If the law is evidently partial and unjust, then it will mask nothing, legitimize nothing, contribute nothing to any class's hegemony. The essential precondition for the effectiveness of law, in its function as ideology, is that it shall display an independence from gross manipulation and shall seem to be just. It cannot seem to be so without upholding its own logic and criteria of equity; indeed, on occasion, by actually *being* just.²²

If the law did not matter – were it only the expression of pure power – Thompson notes, there would be no point in writing a book about the Black Act or the enclosure laws.²³ Moreover, it is the law's partial autonomy from the pure politics of power that renders rulers (unwittingly) 'prisoners of their own rhetoric'.²⁴ They themselves must not be seen constantly flouting the law or else the general public will not accept and respect law as a legitimate social institution.²⁵

To this point, Thompson's approach to the Rule of Law is defensive and at the margins: the law is not *just* ideology; not *only* an instrument of class power; not *wholly* determined by the economic base of society. But Thompson is not content to deny the kind of universal absolute that historians by their nature and training are inclined to debunk. He counters with his own universal absolute: 'the rule of law itself, the imposing of effective inhibitions upon power and the defence of the citizen from power's all-intrusive claims, seems to me to be an unqualified human good'.²⁶

This assertion of the intrinsic virtue of the Rule of Law, far more I suspect than his denunciations of simplistic Marxist dogmas, stunned Thompson's colleagues on the left. They had of course heard similar pronouncements, but from the likes of Hayek, Dicey, and other liberals; never from one of their own on the political left. What could Thompson have been thinking?

21 Thompson, *op. cit.*, n. 3, at p. 264.

22 *id.*, p. 263.

23 *id.*, at p. 268.

24 *id.*, at p. 263.

25 This is precisely the problem England's rulers confronted at the end of the eighteenth and start of the nineteenth century, when they struggled against Thomas Paine and the Jacobite press. 'They could either dispense with the rule of law, dismantle their elaborate constitutional structures, countermand their own rhetoric and exercise power by force; or they could submit to their own rules and surrender their hegemony.' Ultimately, 'rather than shatter their own self-image and repudiate 150 years of constitutional legality, they surrendered to the law' *id.*, at p. 269.

26 *id.*, at p. 266.

2. Sources of Thompson's appreciation of the Rule of Law

Thompson did not write enough about the Rule of Law for readers to determine precisely how he came to revere it or what he meant by it. But there are hints in *Whigs and Hunters* and later writings. Unsurprisingly, Thompson's appreciation of the Rule of Law is less theoretical than historical.²⁷ In *Whigs and Hunters*, he asks:

Did a few foresters get a rough handling from partisan laws? What is that beside the norms of the Third Reich? Did the villagers of Winkfield lose access to the peat within Sinley Rails? What is that beside the liquidation of the *kulaks*?²⁸

His answer: 'What is remarkable (we are reminded) is not that the laws were bent but the fact that there was, anywhere in the eighteenth century, a Rule of Law at all'.²⁹ The parenthetical statement '(we are reminded)' is intriguing: reminded by considerations of the Third Reich and Stalin's purges, or reminded by some person?

While conducting research for this essay, I contacted Thompson's widow, Dorothy – a renowned historian in her own right³⁰ – to inquire about possible sources of her late husband's epiphanic conversion to the Rule of Law. I received in reply a brief letter in which she sheds some light on the subject.³¹

E.P. Thompson returned to complete *Whigs and Hunters* after he finished co-editing, with fellow 'historians in the Marxist tradition' Douglas Hay, Peter Linebaugh, John G. Rule, and Cal Winslow, *Albion's Fatal Tree: Crime and Society in Eighteenth-Century England*.³² According to Dorothy Thompson, his collaboration on that work left him deeply pessimistic about the role of law in society. She engaged him in a 'very heated discussion,' during which she suggested that 'he was leaning too far in the direction taken by some of the contributors to *Albion's Fatal Tree* in dismissing the law simply as an instrument of class power. He took time to re-think the question and added the famous afterword to *Wh and H*.'³³

27 Thompson, himself, confirms this in later comments on the Rule of Law. In 'The State of the Nation', he wrote, '[t]here is no, such abstract entity as the Rule of Law, if by this is meant some ideal presence aloof from the ruck of history'. E.P. Thompson, 'The State of the Nation' in *Writing by Candlelight* (1980) 230.

28 Thompson, op. cit., n. 3, at p. 259.

29 id.

30 See, for example, D. Thompson, *Queen Victoria: The Woman, The Monarchy, The People* (1990); D. Thompson, *The Chartists* (1984).

31 Letter from Dorothy Thompson, 26 June 1997, on file with the author. I also sought information from three of E.P. Thompson's co-editors of *Albion's Fatal Tree*: Douglas Hay, Peter Linebaugh, and John G. Rule. Only Douglas Hay responded, writing that Dorothy would surely be the best source of information (e-mail correspondence from Douglas Hay, 11 October 1999, on file with the author).

32 In fact, as Thompson notes, what became *Whigs and Hunters* was initially planned as a contribution to *Albion's Fatal Tree*, but quickly grew too large. Thompson, op. cit., n. 3, at p. 17.

33 Letter from Dorothy Thompson, 26 June 1997, on file with the author.

This story fits the troubled frame of mind Thompson exhibited in the first pages of the final section of that book:

I sit here in my study, at the age of fifty, the desk and the floor piled high with five years of notes, xeroxes, rejected drafts, the clock once again moving into the small hours, and see myself, in a lucid instant, as an anachronism. Why have I spent these years trying to find out what could, in its essential structures, have been known without any investigation at all? And does it matter a damn who gave Parson Power his instructions; which forms brought 'Vulcan' Gates to the gallows; or how an obscure Richmond publican managed to evade a death sentence already determined upon by the Law Officers, the First Minister and the King?³⁴

If law is nothing more than an instrument of power, none of Thompson's history mattered a damn. But, Thompson concluded, his history *did* matter because the law matters.³⁵

Beyond his wife's influence, Thompson's entire career, in important respects, reflected a commitment to the Rule of Law. His references in the last section of *Whigs and Hunters* to the Third Reich and the *kulaks* were not merely academic; they were reminders of political stakes for which he himself had fought during his life. In particular, his experience of Soviet repression and aggression, which led him to resign his Communist Party membership in 1956, may have taught Thompson to distinguish between governments constrained by legal accountability from those that are not.³⁶ And when he fought to outlaw nuclear weapons from the late 1950s into the 1970s,³⁷ Thompson certainly treated law as if it mattered.

3. Thompson's minimal conception of the Rule of Law

Whatever the source(s) of Thompson's veneration for the Rule of Law, we are left with the question of what exactly the Rule of Law meant to him. This is an inherent issue with the Rule of Law, which has many and varied definitions. In Thompson's case, the problem is unusually acute because he never purported to offer a complete and internally consistent conception of the Rule of Law. His concerns were primarily historical and practical, rather

34 Thompson, *op. cit.*, n. 8, at p. 260.

35 *id.*, pp. 260, 268.

36 See, for example, E.P. Thompson, 'The Secret State' in Thompson, *op. cit.*, n. 27, pp. 151–2, in which Thompson favorably compares the American security apparatus, which is immensely powerful but 'at last subject to some legal accountability', to those of Germany, the Soviet Union, and even Great Britain. Witness also the numerous references to the Soviet authoritarianism littered throughout *The Poverty of Theory*, *op. cit.*, n. 4.

37 On Thompson's nuclear disarmament efforts and, more generally, his participation in peace campaigns from the 1950s through the 1980s, see B. Palmer, 'Homage to Edward Thompson, Part II' (1994) 33 *Labour/Le Travail* 12, at 44–54. Also see M.J. Sukhov, 'E.P. Thompson and the Practice of Theory: Sovereignty, Democracy and Internationalism' (1989) 9 *Socialism and Democracy* 105.

than theoretical. That his conception of the Rule of Law was incompletely theorized Thompson would neither deny nor consider a fault. But he did mean *something* by espousing and defending the Rule of Law. And we can piece together at least some of what he meant by it from his few direct references to the Rule of Law in his writings, the historical context of his references, and his own lived experiences.

In *Whigs and Hunters*, Thompson appears to adopt a minimal conception of the Rule of Law, defining it as little (or nothing) more than a rule of equal application of the legal rules, which limits ruling power. Whatever the content of the legal rules, they must apply equally to the powerful and powerless, to the rich and poor.³⁸ The legal rules themselves may be just or unjust, adopted according to democratic or anti-democratic processes, but so long as the law actually constrains state power, then the state may be said to comport with the Rule of Law.³⁹

This minimal Rule of Law is distinguished from other, more elaborate conceptions, which entail additional conditions. Many (perhaps most) versions of the Rule of Law require not only equal application of the laws but certain legal processes to ensure that legal rules are promulgated and known prior to their application.⁴⁰ Some versions assert that an independent judiciary is 'essential for the preservation of the rule of law'.⁴¹ Still others claim that Rule of Law requires society as a whole, including its rulers, to possess 'a strong sense of commitment to public virtue'.⁴² Finally, in some versions the Rule of Law requires the fulfillment of substantive ('moral') rights.⁴³

That Thompson subscribed to a minimal conception of the rule of law – requiring nothing more than equal application of the laws – rather than some more elaborate conception, is evident from certain of his statements, and the

38 Note how this minimal conception of the rule of law differs from others that equate the rule of law with legal rules. See, for example, A. Scalia, 'The Rule of Law as a Law of Rules' (1989) 56 *University of Chicago Law Rev.* 1175.

39 Joseph Raz refers to this as the 'essentially ... negative function' of the Rule of Law. J. Raz, 'The Rule of Law and its Virtue' (1977) 93 *Law Q. Rev.* 195, at 206. C.L. Ten focuses on the negative value of the Rule of Law to distinguish it from democracy and constitutionalism. C.L. Ten, 'Constitutionalism and the Rule of Law' in *A Companion to Contemporary Political Philosophy* (1995) 394.

40 See, for example, J. Locke, *Second Treatise on Government* (ed. C.B. Macpherson, 1980) 68; A. Zinoviev, *The Yawning Heights* (1979) 574–5. Rawls more generally requires 'some form of due process' for the Rule of Law. J. Rawls, *A Theory of Justice* (1971) 399.

41 See, for example, Raz, *op. cit.*, n. 39, at p. 201.

42 See, for example, N.B. Reynolds, 'Rule of Law and Economic Justice' (1983) 20 *Social Science J.* 103, at 106. Ten, *op. cit.*, n. 39, criticizes Lon Fuller's conception of the Rule of Law for 'cloth[ing] the internal morality of law with unwarranted moral content'. See L. Fuller, *The Morality of Law* (1971).

43 See, for example, R. Dworkin, *A Matter of Principle* (1985) 11–13; M.J. Radin, 'Reconsidering the Rule of Law' (1989) 69 *Boston University Law Rev.* 781, at 815 (asserting that a pragmatic version of the Rule of Law requires obedience to even unacted rules, if strong social agreement exists).

context in which he expressed them, in *Whigs and Hunters*. First and foremost, Thompson stresses only the value of the Rule of Law for limiting government: the rulers imprisoned themselves with their rhetoric of law and the legal rights of free-born Englishmen.⁴⁴ During the sixteenth and seventeenth centuries, the law became a bulwark against the return of 'royal prerogative, or the presumption of the aristocracy' because 'the law, in its forms and traditions, entailed principles of equity and universality which, perforce, had to be extended to all sorts and degrees of men'.⁴⁵

Consequently, the law and its forms 'imposed, again and again, inhibitions upon the actions of the rulers'.⁴⁶ Thus, while law may 'mystify the powerless' and 'disguise the true realities of power', it also 'may modify, in profound ways the behavior of the powerful' and curbing their power and checking their intrusions.⁴⁷ Thompson takes from this the 'obvious point, which some modern Marxists have overlooked, that there is a difference between arbitrary power and the rule of law'.⁴⁸

As set forth in *Whigs and Hunters*, Thompson's conception of the Rule of Law is concerned exclusively with limiting power by equal application of the legal rules; it imposes no particular requirements on legal process or the content of legal rules. Indeed, Thompson remains throughout quite suspicious of legal rules, cautioning that '[w]e ought to expose the shams and inequities which may be concealed beneath this law'.⁴⁹ An important implication of this is that the Rule of Law may remain just even when the legal rules are not.

At one point, Thompson implies that he would not subscribe to a more elaborate theory of the Rule of Law – one which demands that that legal rules be enacted prospectively and with notice to the affected population:

The uncodified English common law offered an alternative notation of law, in some ways more flexible and unprincipled – and therefore more pliant to the 'common sense' of the ruling class – in other ways more available as a medium through which social conflict could find expression, especially where the sense of 'natural justice' of the jury could make itself felt.⁵⁰

This statement is inconsistent with an elaborate conception of the Rule of Law, which requires prospective laws and notice to the affected population because the common law determines legal rules only upon deciding a concrete dispute.⁵¹ By its very nature, the common law is reactive. Even published

44 Thompson, op. cit., n. 3, at pp. 263–4.

45 id., p. 264.

46 id.

47 id., p. 265.

48 id., p. 266. Later, in *Customs in Common*, op. cit., n. 7, at p. 34, Thompson reiterated that '[t]he higher institutions of the law were not free from influence and corruption, but they were freer from these than was any other profession. To maintain their credibility, the courts must sometimes find for the small man against the great, the subject against the King.'

49 Thompson, op. cit., n. 3, at p. 266.

50 id., p. 267.

51 See Sir A. Denning, *Freedom Under Law* (1949).

court rulings may not put the public on adequate notice because common law rules tend to be highly fact-specific, and they evolve over time. Changes in the common law rarely are announced before the fact of some decision.

Another reason for supposing that Thompson adopted a minimal conception of the Rule of Law in *Whigs and Hunters* is history itself. The minimal conception is the most historically defensible version of the Rule of Law, which limited arbitrary power long before constitutional and democratic institutions began displacing absolute monarchy and aristocracy throughout Europe. As the French political theorist Blandine Kriegel has written, '[t]he first states under the rule of law gave neither power to the people nor political liberty to the citizen. They were neither democratic nor liberal.'⁵² The Rule of Law can be said to have arisen as soon as any king's discretion was first constrained by law. So, for example, the Mosaic Code constituted an imposition of the Rule of Law, restricting King Solomon's discretion, nearly a thousand years before the common era.⁵³ Legal and religious limitations distinguished the Jewish kingdoms of 1025 to 587 BC from absolutist states, such as Egypt or China, whose rulers had discretion without limit.⁵⁴ Historians, including some of Thompson's critics, forget just how significant was the evolution from truly absolute monarchy to monarchy limited (however little in the beginning) by law.

Thompson appears to have understood the historical basis of the Rule of Law concept, though he did not discuss it at any length. In *Whigs and Hunters* he refers to the decline of royal prerogative in England during the sixteenth and seventeenth centuries and the constitutional battle between the Crown and Jacobite printers in late eighteenth- and early nineteenth-century England.⁵⁵ Those who would tie-up the Rule of Law with democratic institutions, certain legal processes, or the morality of the legal rules themselves are left to explain the constraints that law placed on power and privilege prior to the democratic revolutions of the late eighteenth century.

There is some evidence, however, from one of Thompson's later writings, that he subscribed to a more elaborate conception of the Rule of Law. In an essay entitled 'The State of the Nation', Thompson briefly (and for the only time so far as I am aware) elaborated on what he had written in the final

52 B. Kriegel, *The State and the Rule of Law* (1995, trans. by M.A. LePain and J.C. Cohen) 50.

53 See S.E. Finer, *The History of Government from the Earliest Times* (1997) 75 ('The Mosaic law was overriding. The king was merely administrator and judge under it'). Of course the Mosaic Law did not apply to all actions of the king (including, for example, foreign policy and recruitment of an army); outside of its purview, the king's discretion was virtually absolute.

54 *id.* Writing in the fourth century before the common era, Aristotle similarly distinguished between 'limited monarchy' or 'royalties according to law' and 'absolute royalty' or 'tyranny', which Aristotle defined as 'that arbitrary power of an individual which is responsible to no one'. Aristotle, 'Politica' in *The Basic Works of Aristotle* (1941, ed. R. McKeon, trans. by B. Jowett) 1285a3–1285b35; 1295a17–20.

55 Thompson, *op. cit.*, n. 3, at pp. 264, 269.

section of *Whigs and Hunters*:

If I have argued elsewhere that the rule of law is an 'unqualified human good' I have done so as a historian and a materialist. The rule of law, in this sense, must always be historically, culturally, and, in general, nationally specific. It concerns the conduct of social life, and the regulation of conflicts, according to rules of law which are exactly defined and have palpable and material evidences – which rules attain towards consensual assent and are subject to interrogation and reform.⁵⁶

The view of the Rule of Law expressed in this paragraph is not easily reconciled with what Thompson wrote in *Whigs and Hunters*.

In 'State of the Nation', Thompson appears to tie in the Rule of Law with democratic institutions, particularly in his requirement of 'consensual assent' to legal rules. But this may be deceptive. As a 'historian in the Marxist tradition', who believed that law always remained in part a sham because of persistent class inequalities,⁵⁷ the idea of *complete* consensual assent to the laws surely would have struck Thompson as absurd. Perhaps that his why he qualified his consensual assent requirement, requiring only that the law 'attain towards consensual assent'. Reading the sentence as a whole, it becomes evident that Thompson meant that for the Rule of Law to exist, the legal rules must be 'subject to interrogation and reform'; otherwise, the law could impose no real limitation on the discretion of the rulers. On this reading, there is no significant inconsistency between my interpretation of Thompson's defence of a minimal conception of the Rule of Law in *Whigs and Hunters* and his later explanation in 'The State of the Nation'.⁵⁸

More troubling is Thompson's assertion in 'The State of the Nation' that legal rules must be 'exactly defined'. This is far more difficult (if not impossible) to reconcile with what he wrote about the Rule of Law in *Whigs and Hunters*, particularly what he wrote about the common law as an institution. If legal rules must be 'exactly defined' for the Rule of Law to exist, then no common law country could be deemed a Rule-of-Law country because common law rules are never precisely defined but evolve from case to case. However, as I have argued in a very different context, if there are any Rule-of-Law states in the world, the common law countries of England, the United States of America, Australia, and Canada, surely are among them.⁵⁹ Thompson himself clearly thought England to be a Rule-of-Law state. Indeed, in *Whigs and Hunters* he asserts that the United States, India, and certain African countries inherited the Rule of Law from England.⁶⁰

56 Thompson, op. cit., n. 27, at pp. 230–1.

57 Thompson, op. cit., n. 3, at p. 266.

58 This interpretation is buttressed by Thompson's statement in *The Poverty of Theory* that the law in eighteenth-century England 'afforded an arena for class struggle, within which alternative notions of law were fought out'. Thompson, op. cit., n. 4, at p. 130.

59 D.H. Cole, *Instituting Environmental Protection: From Red to Green in Poland* (1998) 243.

60 Thompson, op. cit., n. 3, at p. 267.

Finally, if the Rule of Law is truly an ‘unqualified’ good (and Thompson uses that precise term twice in the final pages of *Whigs and Hunters*),⁶¹ then how can it also be ‘historically, culturally and, in general, nationally specific’ as Thompson suggests in ‘The State of the Nation’? The Rule of Law must possess some *sine qua non* that is not historically, culturally, and nationally specific; otherwise, how could historically, culturally, and nationally dissimilar states be commonly referred to as Rule of Law states? That *sine qua non* for Thompson appears, again, to be the effective limitation of ruling power. Any society whose rulers possess unlimited discretion cannot be said to be governed by the Rule of Law. There are, however, various ways of effectively limiting power. Thompson’s reference in ‘The State of the Nation’ to the historical, cultural, and national specificity of the Rule of Law may simply refer to the various ways in which a Rule of Law (that is, effective limitations on power) can be implemented. A given Rule-of-Law state may take on more or fewer of the trappings associated with a maximal Rule-of-Law concept – specified legal processes, an independent judiciary, more or less popular governance. But whatever the means chosen, a state must effectively limit the power of its rulers to be considered a Rule-of-Law state at all.

In this section, I have suggested that Thompson articulated a defence of the Rule of Law that, although not intended to constitute a fully fledged theory, supports a certain minimal conception of the Rule of Law. That conception boils down to this: the Rule of Law is an ‘unqualified good’ to the extent it (actually) limits ruling powers by requiring equal application of the legal rules to rich and poor, the powerful and powerless. The Rule of Law is by no means *sufficient* to ensure just legal rules or a just society in general, but it is a necessary condition in that its opposite – unbridled power – ensures injustice.

THOMPSON’S APOSTASY: REACTIONS FROM THE LEFT

E.P. Thompson’s espousal of the Rule of Law in *Whigs and Hunters* stunned and dismayed many of his ‘colleagues’ on the Left. In this section, I consider the views of three prominent critics of Thompson’s Rule of Law: Morton Horwitz, Adrian Merritt, and Bob Fine. Each of them, I will argue in the next section, has misinterpreted Thompson’s arguments about the Rule of Law, reading far more into them than Thompson intended. Specifically, they wrongly suppose that Thompson’s avowal of the Rule of Law commits him to defending the existing legal (and economic) order. In fact, it commits him only to defend the following two propositions (both of which he expressly maintained): (a) law inevitably mediates social relations; and (b) any just society must be based on the (minimal) Rule of Law.

61 *id.*, pp. 266 and 267.

1. Morton Horwitz on Thompson's 'conservatism'

The esteemed American legal historian Morton Horwitz takes issue with Thompson's claim that the Rule of Law is an 'unqualified human good' because, he argues, it is a 'conservative doctrine' that actually impedes 'the pursuit of substantive justice.'⁶² Horwitz does not dispute the fact that the law constrains power but, he insists, 'it also prevents power's benevolent exercise'. The law creates a formal equality that '*promotes* substantive inequality' by fostering 'a consciousness that radically separates law from politics, means from ends, processes from outcomes'.⁶³ It promotes 'procedural justice that "enables the shrewd, the calculating, and the wealthy to manipulate its forms to their own advantage"'.⁶⁴ Consequently, he cannot understand 'how a Man of the Left can describe the rule of law as "an unqualified human good"'.⁶⁵ Horwitz can only suppose that creeping, middle-age conservatism had affected Thompson's judgment.⁶⁶

2. Adrian Merritt on Thompson as a failed Marxist

Adrian Merritt proffers a more sustained critique of Thompson's 'apologia' for the Rule of Law.⁶⁷ She disputes Thompson's contention that the law can be seen 'simply in terms of its own logic, rules and procedures – that is, simply as law'. It may hold together as a 'logical intellectual construct', Merritt argues, but its logic is 'the logic of class formation'.⁶⁸ She accuses Thompson of positing 'straw men', labeled 'Marxist structuralists', who do not actually exist. No one who believes that law is class-based and ideological would deny Thompson's assertion that the law must be made to appear just and even for the rulers to legitimize the legal rules that serve their interests. The *real* structuralist critique, Merritt argues, peers behind the screen of the law's formal equality to reveal its inevitable class-based content.⁶⁹

Merritt further points to 'an underlying error' in Thompson's assertion that the Rule of Law imposes real constraints on ruling power. Even if the law constrains power – even if the legal rules themselves are most often just – that would 'not lessen its class nature.'⁷⁰ No matter what, Merritt argues,

62 M.J. Horwitz, 'The Rule of Law: An Unqualified Human Good?' (1977) 86 *Yale Law J.* 561, at p. 566.

63 *id.*

64 *id.*

65 *id.*

66 *id.*

67 Adrian Merritt, 'The Nature of Law: A Criticism of E.P. Thompson's *Whigs and Hunters* (1980) 7 *Brit. J. of Law and Society* 194, at 195.

68 *id.*, p. 199.

69 *id.*, pp. 199–200.

70 *id.*, p. 202.

the law is inherently an instrument of class rule; and it cannot be separated from the ideology of the socio-economic system in place:

Law which reflected and supported the ideology of the feudal system gave way to a law which entrenched the ideology of a capitalist one. The struggles which Thompson talked of are part of that realignment. They are not something apart – representing unsullied ideas of justice and equity; they represented ideas of justice and equity refracted through class ideas.⁷¹

Indeed, Thompson's assertion that the law can be just and serve the interests of the poor as well as the rich does not challenge the *real* Marxist structuralist critique, according to Merritt, but is in fact central to it.⁷² The whole point of the law is to legitimize the assertion of power in the eyes of those who are disenfranchised and dispossessed. By throwing them morsels of legal victories every now and again, they may be mollified by the law's formal equality. Meanwhile, the legal system continues operating for the overall benefit of 'the capitalist system, and therefore of modern imperialism.'⁷³

Interestingly, Merritt does not 'deny or belittle the comparative value of the rule of law *vis-à-vis* certain arbitrary power':

But I do not think much is gained by taking time enthusing about it. Moreover I have been struck over the years by the political colour of the people who have 'gone on' about it, and by the selectivity of the abuses about which they complain. It is disappointing to find someone of Thompson's past experiences and allegiances lending support to such people.⁷⁴

Not only is Thompson lending support to the enemy, according to Merritt, he has actually joined them. He has become an 'apologist' for the Rule of Law and the capitalist system that underlies it. 'The nub seems to be that Thompson is not a Marxist historian. He may be a historian who is a Marxist – though even that is doubtful ... But he is not writing Marxist history.'⁷⁵

In addition to his theoretical criticisms, Merritt disputes Thompson's effort to historically situate the Rule of Law in the seventeenth century. 'Thompson's claim', she asserts, 'is untenable without a particular understanding of the rule of law'. And Thompson's understanding of the Rule of Law as the opposite of arbitrary power 'indicates an acceptance of bourgeois ideology'. It reflects 'a bourgeois view of the world' that Thompson anachronistically applies to seventeenth-century England.⁷⁶

Finally, Merritt argues, by advocating the Rule of Law, which is an ideological component of bourgeois capitalism, Thompson necessarily

71 *id.*, p. 203.

72 *id.*, pp. 203–4.

73 *id.*, p. 206.

74 *id.*, p. 207.

75 *id.*, p. 210. Despite this, Merritt notes that '[a]n instrumentalist account ... [Whigs and Hunters] reads convincingly', which implies that Thompson succeeds in writing Marxist history in spite of himself. *id.*, p. 211.

76 *id.*, pp. 207–8.

obstructs efforts to contest 'the legal form and its values'. In espousing the Rule of Law, Merritt suggests, Thompson is obligated to obey the laws whatever their contents.⁷⁷

3. Bob Fine on Thompson as a 'dissenting kind of Marxist'

Thompson's most thoughtful critic on the issue of the Rule of Law may be Bob Fine, who has written extensively on the subject in two works published a decade apart. In his 1984 book, *Democracy and the Rule of Law*,⁷⁸ Fine devotes twenty pages to an 'appreciation' and 'critique' of Thompson's conception and espousal of the Rule of Law. Fine appreciates Thompson's resurrection of 'the liberal ideal of the rule of law in' in opposition to 'the poverty of present-day conservatism', according to which 'the 'rule of law' means an unconditional obligation to obey the state's laws', however draconian or unjust.⁷⁹ More surprisingly, he also praises Thompson for revealing 'the shortcomings of a Marxism which either reduces law to class dictatorship or elevates the state as a whole as a human good'.⁸⁰ Thus, Thompson 'bend[s] the stick ... away from legal nihilism and from bureaucratic statism'.⁸¹ But, Fine concludes, he bends the stick too far.⁸²

Fine discerns 'inherent contradictions' in Thompson's conception of the Rule of Law and offers an extensive 'Marxist critique' of it. In the first place, the Rule of Law need not be characterized as 'an unqualified human good' for one to recognize that it is superior to bald authoritarianism. Fine notes that Thompson does not similarly elevate bourgeois democracy, although it too is unquestionably superior to authoritarianism. So what is it that makes the Rule of Law not just a good but an 'unqualified' good?

The contradiction in Thompson's analysis stems from his exclusive focus on the law's capacity to limit arbitrary power. Fine has no problem with the assertion that law limits power, but, he points out, other institutions in society serve the same function of limiting power. Democratic elections, for example, limit power by subjecting rulers to removal from office. Moreover, the law does not *just* limit power but serves in various ways to enhance the power of the ruling class. By neglecting the law's largely political and economic functions in his assessment of the Rule of Law, Thompson commits the very kind of essentialist-reductionist error for which he criticizes the 'vulgar Marxist' conception of law.⁸³

This is not to say that Thompson neglects the law's utility as an instrument of power. Fine rightly notes that Thompson's works are filled with

77 *id.*, pp. 208–9.

78 Fine, *op. cit.*, n. 11, at p. 24.

79 *id.*, pp. 173–4.

80 *id.*, p. 174.

81 *id.*, p. 175.

82 *id.*

83 *id.*, pp. 175–6.

condemnations of unjust laws and the corrupting influence of capital on the legal system. There is no necessary contradiction in this, however, because Thompson, on Fine's interpretation, views the instrumental use of law as the corruption of its essential function, which is to support the liberty of the people against arbitrary power.⁸⁴ But, Fine argues, this hardly constitutes a sufficient argument that the 'principle institutions of the liberal bourgeois state – parliament, jury trial, "independent judiciary", "impartial" police, etc. – are not only preferable to authoritarianism but are the last word in a free society'.⁸⁵

Fine challenges not only the theoretical basis of Thompson's Rule of Law conception but its historical basis as well. Specifically, Fine claims that '[i]t is an oversimplification – and ultimately wrong –' for Thompson to reduce all the eighteenth-century struggles described in *Whigs and Hunters* to 'a conflict between traditional use-rights and legally enforced private property rights'.⁸⁶ In the first place, it was not only a dispute between peasants and craftspeople on the one hand, asserting their traditional use rights, and the gentry on the other, asserting outright ownership. The rebellion crossed class boundaries to include small gentry, 'capitalist farmers', and merchants, whose own property rights were abrogated in favor of the 'large gentry landowners'.⁸⁷ Indeed, 'middling men' were 'among the foremost in protest against these laws as an 'unconstitutional oppression'.⁸⁸ Moreover, it is not clear, according to Fine, that the hunters were merely trying to defend traditional use rights, as opposed to asserting 'absolute private property' rights of their own.⁸⁹ All of this seems to cut against Thompson's claim that the rebellion constituted a "plebian" activity based on the defence of an 'older moral economy'.⁹⁰

Assuming (for the moment) Fine's historical criticisms are accurate, what caused Thompson to gloss over historical facts that seemed to refute his ideal Rule of Law? Fine suggests that Thompson was affected by 'a romanticism which sees in pre-bourgeois property relations a "human" state of affairs which the mass of the people wish to hold on to, and which sees the development of capitalist property an unmitigated evil which the mass of the people more or less consciously resist.'⁹¹ The history of eighteenth-century England presented in *Whigs and Hunters* actually challenged Thompson's own romantic vision with evidence that the law was really not 'corrupted' by large landholders; rather, the law remained what it always had been: an instrument of political power. In light of that history, how could Thompson

84 *id.*, p. 178.

85 *id.*, p. 180.

86 *id.*, p. 182. Surely, Fine does not mean to imply that use rights are not property rights.

87 *id.*, pp. 182–3.

88 *id.*, p. 183. Fine points out that Adam Smith himself had opposed the game laws, *id.*, at p. 186.

89 *id.*, at p. 185.

90 *id.*

91 *id.*, at p. 186.

maintain the myth of freeborn Englishmen asserting their traditional legal and constitutional rights? Only by fashioning a 'transcendent' Rule of Law concept that would distinguish 'corrupt' laws from the ideal Rule of Law.⁹²

According to Fine, Thompson's own mythic account of the legal and constitutional rights of freeborn Englishmen was itself inconsistent with 'any of Thompson's definitions of the rule of law'.⁹³ The myth was based on a natural law theory of property – 'rooted in privilege, inequality, dependence, obligation and immutable law' – which could not be married with Thompson's conception of the Rule of Law.⁹⁴ As Fine puts it, 'Thompson's over-critical view of private property makes a poor partner for his under-critical view of the rule of law'.⁹⁵ If property and law arose together, as Thompson's own history demonstrates, how could he possibly disassociate the two? Indeed, Fine argues that '[t]he rule of law expresses the very fetish of law as a force remote from productive relations that Thompson so powerfully criticizes'.

Despite these criticisms, Fine agrees with Thompson '[t]hat Marxism must ally with liberalism in defence of civil liberties and democratic rights against their erosion by the state'.⁹⁶ However, Thompson's defence of the Rule of Law as an 'unqualified human good' is fatally flawed by its inherent exclusion of 'a Marxist critique of its limitations'. Thompson thus 'surrenders the vista of a far more radical democracy than that envisaged in liberal constitutions, put forward by Marx'.⁹⁷

A decade after the publication of *Democracy and the Rule of Law*, Bob Fine returned to Thompson's Rule of Law conception in 'The Rule of Law and Muggleonian Marxism: The Perplexities of Edward Thompson'.⁹⁸ In this work, Fine repeated some of his earlier criticisms,⁹⁹ and delved further into some of Thompson's other reflections on law – most notably his self-identification in 1968 as a 'Muggleonian Marxist', an antinomian who believes that human laws (legality) are not binding on Protestant Christians.¹⁰⁰ Antinomianism opposed the spirit of faith and love to the spirit of reason, which underlies the 'moral law'.¹⁰¹ From Fine's perspective, antinomianism is a defective tradition, and Thompson's self-characterization as an antinomian was unreflective.¹⁰² Consistent with his analysis in

92 *id.*, p. 187.

93 *id.*

94 *id.*

95 *id.*, p. 188.

96 *id.*

97 *id.*

98 Fine, *op. cit.*, n. 6.

99 For example, Fine again argues that Thompson participated in the same kind of reductionism (though to a very different result) as the 'vulgar Marxism' he deprecated, *id.*, p. 205.

100 The term 'antinomian' is derived from the Greek *anti nomos*, which means against law, tradition, or custom. See *id.*, p. 211, n. 1.

101 *id.*, pp. 206–8.

102 *id.*, pp. 207–8.

Democracy and the Rule of Law, Fine concludes that [w]e cannot privilege politics or law or love in isolation'.¹⁰³

RESPONSES TO THOMPSON'S CRITICS

Thompson's critics have, generally speaking, misunderstood what he meant by the Rule of Law. They have credited him with arguments he did not make (and would not have made) and discredited him for neglecting what he in fact articulated. Most interestingly, all three critics actually concur with all that Thompson actually meant in his defence of the Rule of Law in *Whigs and Hunters* (excepting perhaps Thompson's prediction that the law would always be a necessary institution for any complex society): that legal limitations on arbitrary authority are always and everywhere a good thing.

1. Response to Horwitz

Morton Horwitz's criticism of Thompson's espousal of the Rule of Law rests on the erroneous supposition that the Rule of Law can only be a conservative doctrine, which 'impedes the pursuit of substantive justice'.¹⁰⁴ Certainly, Thompson's Rule of Law concept was no such impediment to substantive justice. It was, in fact, little (if anything) more than the effective limitation of arbitrary power. As such, it could neither impede nor ensure the pursuit of substantive justice. It was, rather, neutral as to the substantive justness of legal rules.¹⁰⁵

That this was Thompson's view is clear, once again, from his many assertions distinguishing between the Rule of Law and the legal rules, which often are unjust. Thompson makes this clear not only in *Whigs and Hunters*¹⁰⁶ but in several of his later works. In *Customs and Commons*, for example, he states in no uncertain terms that the law in England during the enclosure era:

was employed as an instrument of agrarian capitalism, furthering the 'reasons' of improvement. If it is pretended that the law was impartial, deriving its rules from its own self-extrapolating logic, then we must reply that this pretence was class fraud.¹⁰⁷

Thompson evidently felt that he could condemn the law for perpetrating class fraud while maintaining a commitment to the Rule of Law, which

103 *id.*, p. 211.

104 Horwitz, *op. cit.*, n. 62, at p. 566.

105 This is not to imply, of course, that Thompson himself was neutral as to the justness of legal rules; only that his commitment to the Rule of Law was independent of the content of actually existing legal rules.

106 See Thompson, *op. cit.*, n. 3, at p. 266.

107 Thompson, *op. cit.*, n. 7, at p. 176.

remained for him 'an unqualified human good'.¹⁰⁸ Clearly, the Rule of Law meant for Thompson something other than what Horwitz supposes.

Nevertheless, Horwitz claims that any adherence to the Rule of Law (whatever its scope) contributes to false social consciousness that the legal system is just. And so Thompson's assertion of support for the Rule of Law nourishes the very conditions of injustice that Thompson repudiates throughout his works. But Thompson's writings strongly imply that false consciousness is neither a necessary nor a desirable attribute of his conception of law. In *Whigs and Hunters* he asserts that he is 'not starry-eyed' about the law; to the contrary, he insists on 'expos[ing] the shams and inequities which may be concealed beneath this law'.¹⁰⁹ Moreover, he claims, '[i]f the law is evidently partial and unjust, then it will mask nothing, legitimize nothing, contribute nothing to any class's hegemony'.¹¹⁰

Thompson obviously gave his readers more credit than Horwitz would allow for their abilities to distinguish between the law's capacity for limiting arbitrary power and power's capacity for manipulating law. Moreover, if society is sometimes deceived into believing that the legal system as a whole is just when it is not, is that a consequence of believing in the Rule of Law? Perhaps, if the Rule of Law is a characteristic institution only of bourgeois capitalism. But for Thompson it was not. He held that '[i]t is not possible to conceive of any complex society without law'.¹¹¹ So the Rule of Law, as a limitation on arbitrary power, is a necessary attribute of any just society, whatever its political-economic basis. This line of thinking surely placed Thompson at odds with Marxists (including Marx himself), who foresaw the withering away of state and law.¹¹² But that does not seem to be Horwitz's concern.

Finally, Thompson's commitment to the Rule of Law cannot be ascribed to a creeping middle-age conservatism, as Horwitz suggests.¹¹³ Nothing in Thompson's later writings suggests that he had grown 'conservative' in any

108 In a 1979 interview, Thompson restated his position quite clearly: 'I don't denounce all law. There will always be laws. We have to fight against bad laws and against the class-biased administration or imposition of law. Also, to break the law where, as in the case of illegitimate activity by the M15 or Special Branch, we are duty bound to do so.' 'E.P. Thompson: Recovering the Libertarian Tradition' (1979) 22 *The Leveller* 20, at 21.

109 Thompson, *op. cit.*, n. 3, at p. 266.

110 *id.*, p. 263. In *Customs and Commons*, *op. cit.*, n. 7, at pp. 113–14, Thompson admits that legal victories by 'humble citizen[s] over the great or the royal', however infrequent, could 'give popular legitimacy to the law and to endorse the rhetoric of constitutionalism upon which the security of landed property was founded'. But this did not inordinately bother Thompson, who believed the key was to dispel the notion by illuminating the reality behind the rhetoric.

111 Thompson, *op. cit.*, n. 3, at p. 260.

112 See, for example, K. Marx, *Critique of the Gotha Programme* (1938, ed. C.P. Dutt) 10.

113 Horwitz, *op. cit.*, n. 62, p. 566.

meaningful sense. He remained staunchly progressive politically, strongly opposed to 'inhumane' capitalism,¹¹⁴ and sharply critical of unjust social institutions, including the law. In 1979 (four years after *Whigs and Hunters* was published), Thompson wrote, 'I do not say that, even yet, all law is no more than sham'.¹¹⁵ Did this contradict his earlier assertion that the Rule of Law was an 'unqualified human good'? Apparently not in Thompson's own mind, for that same year he clearly reaffirmed his commitment to the Rule of Law.¹¹⁶ But how can the Rule of Law remain 'an unqualified human good' if 'all law is no more than sham'? Only if the Rule of Law is viewed as a necessary but not sufficient condition for a just legal system and society, which imposes real constraints on arbitrary power but few, if any, constraints on the content of laws. There is nothing inherently contradictory between this minimal conception of the Rule of Law and a critical, even radical, attitude toward existing legal systems.

2. *Response to Merritt*

Adrian Merritt's critique of Thompson's espousal of the Rule of Law is even shallower than Horwitz's. It is simply not the case, as Merritt claims, that Thompson, in avowing the Rule of Law, became an apologist for advanced capitalism and turned his back on the underlying class-based content of law. As already noted, Thompson did not cease to rail against capitalism and unjust, class-based laws after he espoused the Rule of Law. And it remains for Merritt to explain why Thompson's criticisms were undermined or delegitimized by his claim that the Rule of Law is 'an unqualified human good' (only) because it limits arbitrary power.

The crux of Merritt's dispute with Thompson appears to be Merritt's insistence that the Rule of Law is inextricably intertwined with bourgeois ideology.¹¹⁷ By committing himself to the Rule of Law, Thompson has, in Merritt's view, committed himself to 'a bourgeois view of the world',¹¹⁸ and

114 In the posthumously published essay 'Country and City', Thompson quotes with approval Raymond Williams's assertion that 'resistance to capitalism is the decisive form of the necessary human defence'. E.P. Thompson, 'Country and City' in *Making History: Writings on History and Popular Culture*, ed. E.P. Thompson (1994) 249.

115 E.P. Thompson, 'The State and Civil Liberties' in Thompson, op. cit., n. 27, p. 106. That same year, he advocated civil disobedience to unjust laws: 'In a contest for a human order, laws must be changed and disputed of course. Particular laws may and will be broken, as a matter of conscience, as has been done in the past. There must be inflexible opposition to attempts to trench upon basic constitutional rights; and if they do trench, then we must disobey.' id., at p. 253.

116 id.

117 This seems to commit Merritt to the very kind of Marxist structuralism against which Thompson rebelled. Ironically, Merritt herself becomes one of the 'strawmen' she accuses Thompson of attacking.

118 Merritt, op. cit., n. 67, at pp. 207–8

'to obey the laws whatever their contents'.¹¹⁹ This hardly follows. One can – and Thompson certainly did – logically maintain that (a) law is always and everywhere good to the extent it limits arbitrary power and (b) specific legal rules may be (and are in fact) unjust. By the same token, one may criticize legal rules – as all legal scholars do from time to time – without opposing oneself to the Rule of Law.

Still, Merritt would have a legitimate argument against Thompson *if* the Rule of Law were inextricably intertwined with bourgeois democracy. Were that the case, Thompson's espousal of the former would commit him to support the latter. But Thompson expressly denied that the Rule of Law is an essential characteristic only of bourgeois democracy.¹²⁰ And history demonstrates that the Rule of Law arose in European societies centuries before the onset of bourgeois democracy. Contrary to Merritt's assertion, the one is not part and parcel of the other.

Significantly, Merritt does not 'deny or belittle the comparative value of the rule of law *vis-à-vis* arbitrary power'. But that is virtually all Thompson meant in espousing the Rule of Law. So, the logical conclusion is that Merritt, despite everything, agrees with Thompson's conception of the Rule of Law. Her only real objection may be with Thompson's use of the phrase 'Rule of Law' to differentiate limited from unlimited power. Merritt (unlike Thompson) identifies that phrase exclusively (and inappropriately) with bourgeois democracy. Finally, Merritt may be right that not 'much is gained by taking time enthusing about' the comparative value of law as against arbitrary power. But that does not amount to much of a criticism.

3. *Response to Fine*

Unlike Merritt, Bob Fine properly distinguishes Thompson's conception of the Rule of Law from 'conservative' versions, according to which 'the 'rule of law' entails an unconditional obligation to obey the state's laws', however unjust.¹²¹ To his credit, Fine's criticisms of Thompson's Rule of Law concept are more refined and less strident; he is not out to brand Thompson an apostate. But his criticisms nevertheless fail to undermine Thompson's defence of the Rule of Law.

The 'inherent contradictions' Fine purports to discover in Thompson's conception of the Rule of Law are really not contradictions at all. Thompson elevates the Rule of Law as 'an unqualified human good' because it is invariably superior to unbridled authoritarianism. Fine points out that bourgeois democracy is also invariably superior to authoritarianism, but Thompson does not similarly elevate bourgeois democracy as 'an

119 *id.*, pp. 208–9.

120 See Thompson, *op. cit.*, n. 3, at p. 264 (discussing the decline of 'royal prerogative' during the sixteenth and seventeenth centuries under the Rule of Law).

121 Fine, *op. cit.*, n. 11, at pp. 173–4.

unqualified human good'. There is no contradiction in this, however, because there may be (and Thompson certainly thought there were) other political-economic systems preferable to bourgeois democracy. The fact that bourgeois democracy is superior to authoritarianism makes it at best a *qualified* human good. What makes the Rule of Law an *unqualified* human good for Thompson is the lack of any available substitute mechanism for limiting arbitrary power in complex societies.

Of course the law is not the only institution that limits arbitrary power. Fine correctly points out that democratic elections serve a similar function. Why, then, does Thompson not claim that democracy is 'an unqualified human good'? It's a fair question, but it has no bearing on the warrant for Thompson's assertions about the Rule of Law. Whether the Rule of Law is 'an unqualified human good' is independent of whether democratic elections are an unqualified human good, unless democratic elections and the Rule of Law are prerequisites for one another. But, as already noted, Thompson maintained, and history demonstrates, that they are not.

The final 'contradiction' Fine purports to discover in Thompson's assessment of the Rule of Law is that it amounts to the very kind of essentialist reductionism for which Thompson repudiates Marxist-structuralist accounts of law. This claim would be true *if* Thompson's espousal of the Rule of Law caused him to neglect the law's political and economic functions in society, which often turn out to be unjust. But it did not. Contrary to Fine's assertion, Thompson's conception of the Rule of Law did not entail the proposition that other 'liberal bourgeois' institutions, such as parliament, jury trials, an independent judiciary, and an impartial police force, were 'the last word in a free society'.¹²² True, Thompson preferred these institutions to those of authoritarianism – in particular, he believed that the jury system was crucial for the preservation of democracy, whatever society's economic basis¹²³ – but they were not entailed by his commitment to a minimal conception of the Rule of Law (for reasons set out earlier).

Historically, the Rule of Law (as Thompson apparently understood it) existed, to greater or lesser extents, in states without parliaments, jury trials, or independent judiciaries. France's *ancien régime*, for example, evolved from a patrimonial state to approximate (at least) a Rule of Law state of regulated sovereign power, although it remained exceedingly centralized and undemocratic.¹²⁴ Surely one can appreciate this historical evolution without acquiescing in the political and economic institutions of absolutist France.

122 *id.*, p. 180.

123 See, for example, E.P. Thompson, 'In Defence of the Jury' in *Making History: Writings on History and Culture* (1994) 141. Thompson also noted, significantly, that the bourgeoisie 'had a radical childhood', and that the notion of 'due process at law,' as the defence of the citizen against the resources of the state, was part of that heritage'. E.P. Thompson, 'The Common People and the Law' (1980) 24 *New Society* 182, at 184.

124 See Kriegel, *op. cit.*, n. 52, at pp. 78–81, and ch. V generally.

Fine's arguments about the role of small landowners and yeoman farmers in the rebellions against enclosure laws are quite sound, but they in no way undermine Thompson's claims about the Rule of Law. In fact, Thompson expressly recognized that the rebellion crossed class lines, and that it involved not a pure conflict between use rights and ownership claims but a conflict between differing perceptions of (absolute) property rights.¹²⁵ Fine may be right that this conflicts with Thompson's general portrayal of the rebellion as a 'plebian' activity based on the defence of an 'older moral economy'.¹²⁶ But what implication is there in this for Thompson's conception of the Rule of Law as a restraint on arbitrary power? It is difficult to perceive a connection.

Fine suggests that Thompson's notion of property, which informed his mythic account of the legal and constitutional rights of free-born Englishmen, necessarily conflicted with his view of the Rule of Law.¹²⁷ Thompson, Fine claims, reviled the concept of private property while elevating the Rule of Law; but Thompson's own history demonstrated that property and law arose together. So, how could he effectively separate the two? Thompson *was* able to separate the two because he did not revile *all* private property rights as Fine suggests. As previously noted,¹²⁸ Thompson (quite properly) understood the dispute between Whigs and hunters as a contest over whose version of property rights would prevail. Whenever they could afford it, the hunters hired lawyers to fight for their legal rights, just as small copyholders and the wealthiest Whigs did.¹²⁹ They held no romantic illusions about themselves; they were simply fighting for (what they perceived to be) their own. They were attempting to use the law, in Marx's words, to expropriate the expropriators.¹³⁰ Which is what makes the law so valuable from Thompson's perspective: it provides a forum in which right and power can be contested. For this reason (among others), the law *always* is preferable to unbridled authoritarianism, against which the ruled simply have no chance.

Thompson surely would deny Fine's claims that his elevation of the Rule of Law 'expresses the very fetish of law as a force remote from productive relations', which necessarily excludes 'a Marxist critique' of law.¹³¹ These claims stem from a conflation of the Rule of Law with the legal rules, which Thompson took pains to avoid. The legal rules may be strongly influenced –

125 Thompson, *op. cit.*, n. 3, at p. 261. In *Customs in Common*, *op. cit.*, n. 7, at pp. 102–3, Thompson wrote that '[t]he middling farmers, or yeoman sort, influenced local courts and sought to write stricter by-laws as hedges against both large and petty encroachments; they could also employ the discipline of the poor laws against those beneath them, and on occasion they defended their rights against the rich and powerful at law.'

126 Fine, *op. cit.*, n. 11, at p. 185.

127 *id.*, p. 188.

128 Thompson, *op. cit.*, n. 3, at p. 261.

129 *id.*

130 See K. Marx, 'The Civil War in France' in K. Marx and F. Engels, *II Selected Works* (1969) 223.

131 Fine, *op. cit.*, n. 11, at p. 188.

even determined – by productive relations. As Thompson put it, the law may be just a ‘sham’. But that does not negate the universal value of the Rule of Law as a constraint on arbitrary power. Nor does his belief in the Rule of Law prevent Thompson from engaging in a ‘Marxian’ analysis of legal rules; witness his assertions about the law as ‘class fraud’ in *Customs in Common*.¹³²

Fine may be right that Thompson’s commitment to the Rule of Law ‘surrenders the vista of a far more radical democracy than that envisaged in liberal constitutions, put forward by Marx’.¹³³ More than anything, this assertion appears to challenge Thompson’s claim that ‘[i]t is not possible to conceive of any complex society without law’.¹³⁴ Marx did, of course, conceive of such a society: communism. And there is no denying the Thompson’s statement about the inevitable role of law in any complex society is contrary to Marx’s theory of the withering away of state and law.¹³⁵

On the other hand, Thompson’s conception of the Rule of Law is remarkably consistent with some of Marx’s early writings on law. For instance, in *Debates on the Freedom of the Press* (1842), Marx wrote:

Laws are in no way repressive measures against freedom, any more than the law of gravity is a repressive measure against motion, because while, as the law of gravitation, it governs the eternal motions of the celestial bodies, as the law of falling it kills me if I violate it and want to dance in the air. Laws are rather the positive, clear, universal norms in which freedom has acquired an impersonal, theoretical existence independent of the arbitrariness of the individual. A statute-book is a people’s bible of freedom.¹³⁶

Marx later abandoned this liberal-democratic view of law; at least he failed to reconcile it with the more instrumental view of law he articulated in later works.¹³⁷ No scholar, so far as I am aware, has ever asserted that Marx’s claims in *Debates on the Freedom of the Press* excluded a Marxian critique of law, reified capitalist democracy, or committed the author to acquiesce in all laws, however unjust.

In the final analysis, if Thompson is right (against Marxist utopianism) that the law is a necessary institution for any complex society, then he must also be right that the Rule of Law is ‘an unqualified human good’. Thompson’s premise presents a clear challenge to Marxist theories of the instrumental role of law in bourgeois democracies and the withering away of

132 See Thompson, op. cit., n. 7, at p. 176.

133 See Fine, op. cit., n. 11, at p. 188.

134 Thompson, op. cit., n. 3, at p. 260.

135 See A.E.-S. Tay and E. Kamenka, ‘Marxism, Socialism and the Theory of Law’ (1985) 23 *Columbia J. Transnational Law* 217, at 224–5 (‘Marx’s vision of the ultimate future, however, was always of a nonregulated society, or at least of a self-regulated society, in which state and law as coercive instruments had lost the medium of their existence’).

136 K. Marx, ‘Debates on the Freedom of the Press’ in K. Marx and F. Engels, *Collected Works* (1975) 166.

137 See, for example, K. Marx, *A Contribution to Political Economy* (1970 edn.) 20–1; and K. Marx, *Capital* (1967 edn.) 89–90.

state and law along the socialist road to communism. If such a stateless and lawless society is viable, then Thompson is wrong about the universal value of the Rule of Law. He himself recognized this possibility, but noted, '[a] historian is unqualified to pronounce on such utopian projections. All that he knows is that he can bring in support of them no historical evidence whatsoever.'¹³⁸ As always when theory and history conflicted, Thompson sided with history.¹³⁹

CONCLUSION: RECONCILING THE LIBERAL RULE OF LAW WITH RADICAL LEGAL CRITICISM

E.P. Thompson's valorization of the Rule of Law, combined with his deep distrust of legal rules, resurrected 'a libertarian Marxist tradition'¹⁴⁰ that stemmed from Marx's own early writings. That tradition, long forgotten by many on the left, points the way toward a possible reconciliation of radical and liberal (as opposed to conservative and neo-authoritarian) theories of law.

This is not the place to attempt such a reconciliation. But liberals and radicals should be able to agree upon two of Thompson's fundamental propositions about law: (i) that the Rule of Law is 'an unqualified human good' to the extent that it restricts arbitrary power and (ii) that laws should be just, and should be challenged when they are not. These propositions are not inconsistent. As we have seen, on Thompson's minimal definition of the Rule of Law there is no implication that the legal rules are just. But even when they are unjust, the Rule of Law itself remains a human good – a necessary but insufficient condition for a just society.

However improbable a reconciliation between radical and mainstream theories of law may seem, particularly in light of the contemporary radical antipathy for 'rights discourse,' as exemplified in the critical legal studies literature,¹⁴¹ some scholars have lately begun to contemplate how it might be accomplished. Don Herzog, for one, has called on radicals to 'embrace liberalism' because it provides 'just the right resources for criticizing our practices and suggesting changes'.¹⁴² Echoing Thompson and the young Marx,¹⁴³ Herzog notes that liberalism had its roots in dissent and rebellion.¹⁴⁴

138 See Thompson, *op. cit.*, n. 3, at p. 266.

139 See, generally, Thompson, *op. cit.*, n. 4.

140 'E.P. Thompson: Recovering the Libertarian Tradition', *op. cit.*, n. 108, at p. 20.

141 See, for example, M. Tushnet, 'Critique of Rights: An Essay on Rights' (1984) 62 *Texas Law Rev.* 1363.

142 D. Herzog, 'As Many As Six Impossible Things Before Breakfast' (1987) 75 *California Law Rev.* 609, at 610.

143 See Thompson, *op. cit.*, n. 125, at p. 184 (noting the 'radical childhood' of the bourgeoisie); K. Marx and F. Engels, 'The Communist Manifesto' in *The Marx-Engels Reader*, ed. R.C. Tucker (1978, 2nd edn.) 475 (noting that '[t]he bourgeoisie, historically, has played a most revolutionary part').

144 Herzog, *op. cit.*, n. 142, at pp. 625–8, 630.

Another scholar hoping to reconcile radical and liberal theories of law, Jeffrey Blum, notes that 'the radicals' attacks and the liberals' responses have been largely counterproductive for the values shared by each . . . the antipathy between [them] has worked largely to the detriment of both'.¹⁴⁵ While bickering among themselves, liberals and radicals have left the playing field to 'conservative' and 'neo-authoritarian' forces that, radicals and liberals agree, pose grave threats to society.¹⁴⁶ Blum suggests that 'the time has come for intellectuals of the center-left to abandon past mistakes of enhancing rivalries between liberals and radicals, and to work instead for a common cause of liberalism that for better or worse, is likely to be taking on an increasingly radical character'.¹⁴⁷ He calls on radicals to liberalize and liberals to radicalize in a common enterprise of 'radical liberalism' to counter conservative and neo-authoritarian forces.¹⁴⁸

These efforts to marry radical and liberal theories of law would profit from close attention to E.P. Thompson's life and work. In word and in deed – particularly in his combined reverence for the Rule of Law and distrust of legal rules – Thompson personified 'radical liberalism' (or 'liberal radicalism').

145 J. Blum, 'Critical Legal Studies and the Rule of Law' (1990) 38 *Buffalo Law Rev.* 59, at 61.

146 *id.*, p. 61. As an example of creeping neo-authoritarianism, Blum, *id.*, p. 99, points to the US government's 'War on Drugs', in which, he argues, fundamental individual liberties are being sacrificed supposedly to protect society.

147 *id.*, p. 65.

148 *id.*, p. 61.